(filed May 10, 2004).[6] In response, the government filed a motion to dismiss and a motion for summary judgment. The latter motion included a declaration and supporting documents (see App., *infra*, 1a-19a) demonstrating that petitioner received credit on his state sentence for the time at issue. The government argued that petitioner failed to state a claim for relief because, under 18 U.S.C. 3585(b), petitioner was not entitled to credit for time spent in official custody when that time had been credited against another sentence. The government also argued that the federal sentencing court had discretion, under Section 3584(a), to order that petitioner's federal sentence be served consecutively to his as-yet-unimposed sentence. See Gov't Mot. to Dismiss at 3-5.

c. In a brief Order, the district court dismissed for the reasons discussed in the government's motion to dismiss, rejecting petitioner's claim that "he has not received proper credit for time spent in state custody prior to federal custody." Pet. App. 4a-5a & n.1.

4. On appeal, petitioner, again proceeding pro se, argued that, under Section 3584(a), the federal court

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[6] Section 3584(a) provides in pertinent part:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively[.] * * * Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

18 U.S.C. 3584(a).

lacked authority to impose a federal sentence consecutive to an as-yet-unimposed state sentence. The government responded that "[t]he Attorney General, through the Bureau of Prisons (BOP), determines what credit, if any, will be awarded to prisoners for time spent in custody prior to the commencement of their federal sentences," Gov't C.A. Br. 11, and that petitioner was not entitled under Section 3585(b) to the time at issue because he already had received credit for that time from the State, *id.* at 16. In response to petitioner's argument that the state court had ordered the state sentence to run concurrently, the government contended that a state court has no authority to order how a federal sentence is computed. *Id.* at 12. The government further noted that Fifth Circuit precedent afforded the district court discretion under Section 3584(a) to run petitioner's sentence consecutively to his impending state sentence, and that, "absent language in the sentencing decision to the contrary," Section 3584 dictated that they be served consecutively. *Ibid.*

The court of appeals affirmed in a short, unpublished per curiam. Relying on *United States* v. *Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991), cert. denied, 500 U.S. 925 (1991), and Section 3584(a), the court of appeals held that "[t]he sentencing court had the discretion to order that a federal term of imprisonment run either consecutively to or concurrently with an anticipated, but not yet imposed, state sentence." Pet. App. 2a. The court observed that "the fact that the state court ordered the state sentence to run concurrently with the federal sentence does not change the consecutive nature of the federal sentence," because federal authorities are not bound by sentencing orders from state courts. *Id.* at 3a. Finally, the court held that

"because the record indicates that the time that [petitioner] spent in federal custody pursuant to a writ of habeas corpus ad prosequendum was credited against his state sentence, the BOP correctly applied 18 U.S.C. § 3585(b)(2) when it did not include this time as credit towards [petitioner's] federal sentence." *Ibid.*

## ARGUMENT

Petitioner contends (Pet. 5-30) that the district court did not have the authority to direct that his sentence run consecutively to a state sentence that had not yet been imposed. According to petitioner, 18 U.S.C. 3584(a) restricts a district court's ability to impose a sentence consecutive to a state sentence to instances where the defendant "is already subject to" the state sentence. 18 U.S.C. 3584(a). Petitioner contends that the court of appeals' rejection of that interpretation conflicts with decisions of other courts of appeals.

Petitioner is correct that the courts of appeals disagree on whether a federal court has the authority to direct a sentence to be served consecutively to a yet-to-be imposed state sentence. In addition to the Fifth Circuit, the Eighth, Tenth, and Eleventh Circuits have ruled that district courts have such authority. See *United States* v. *Andrews*, 330 F.3d 1305, 1306-1307 (11th Cir.) (per curiam), cert. denied, 540 U.S. 1003 (2003); *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) (per curiam); *United States* v. *Williams*, 46 F.3d 57, 58-59 (10th Cir.), cert. denied, 516 U.S. 826 (1995). The courts of appeals for the Sixth, Seventh, and Ninth Circuits have held that district courts lack that authority. *Romandine* v. *United States*, 206 F.3d 731, 738 (7th Cir. 2000); *United States* v. *Quintero*, 157 F.3d 1038, 1039-1040 (6th Cir. 1998); *United States* v.

*Clayton*, 927 F.2d 491, 492 (9th Cir. 1991). This case, however, does not present that question, and in any event, resolving that conflict is unnecessary. Further review is not warranted.[7]

1. Although both parties and the lower courts framed the issue as turning in part on a court's authority under 18 U.S.C. 3584(a) to order consecutive sentences, this case does not present the question whether a district court has authority under that Section to order a federal sentence to be served consecutive to an as-yet-unimposed state sentence. Here, the district court did not even purport to do so. As petitioner concedes (Pet. 2), the federal sentence was silent on the relationship between the federal sentence and any future sentence. See App., *infra*, 15a. The question presented by the petition—"whether a federal judge can *require* a defendant to serve a term of imprisonment consecutively to another sentence that has not yet been imposed," Pet. i (emphasis added)—is therefore not presented by the facts of this case.

Properly understood, this case involves BOP's authority under 18 U.S.C. 3585 and 3621, not a sentencing court's authority under 18 U.S.C. 3584. As this Court held in *United States* v. *Wilson*, 503 U.S. 329 (1992), BOP, not the federal sentencing court, has the authority to determine how much credit a defendant should

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[7] The Court denied review of the issue in *Lackey* v. *United States*, 125 S. Ct. 2963 (2005) (No. 04-9286); *Martinez* v. *United States*, 125 S. Ct. 1299 (2005) (No. 04-7129); and *Andrews* v. *United States*, 540 U.S. 1003 (2003) (No. 03-136). The same question is raised by the petition for a writ of certiorari in *Cox* v. *United States*, 125 F. App'x 973 (10th Cir.), petition for cert. pending, No. 05-454 (filed Oct. 5, 2005); and *Cruz* v. *United States* 153 F. App'x 587 (11th Cir. 2005), petition for cert. pending, No. 05-8866 (filed Jan. 10, 2006).

receive for time spent in official detention before the commencement of his federal sentence. See *id.* at 332-337 (interpreting Section 3585). That is because, "[a]fter a district court sentences a federal offender, the Attorney General, through BOP, has the responsibility for administering the sentence. *Id.* at 335 (citing 18 U.S.C. 3621(a)).

Here, as the court of appeals concluded, "BOP correctly applied 18 U.S.C. § 3585(b)(2)" when it declined to credit petitioner for the time that already had been credited against his state sentence. Pet. App. 3a. BOP also did not abuse its discretion in refusing to designate, nunc pro tunc, state custody as the place of petitioner's federal confinement. See 18 U.S.C. 3621(b). As explained in the decision of the Regional Director, BOP determined that "commencement of [petitioner's] federal sentence by way of a concurrent designation [wa]s not consistent with the goals of the criminal justice system." App., *infra*, 28a. BOP reached that conclusion after taking into account the federal sentencing court's wishes. But the letter from the Probation Office that conveyed the court's "wishes," *id.* at 18a, was not part of the judgment and commitment order, and the court had no power, 18 months after sentencing, to amend the judgment or modify the sentence. See Fed. R. Crim. P. 35(a) (limiting correction of "arithmetical, technical, or other clear error" to within seven days after sentence); see, *e.g.*, *United States* v. *Penna*, 319 F.3d 509, 512 (9th Cir. 2003) ("The district court must correct a sentence within seven days after orally pronouncing it or else it loses its jurisdiction to modify the sentence."). The Regional Director's decision (App., *infra*, 26a-28a) and BOP's relevant Program Statement (see note 3, *supra*) make clear that, while the court's intentions are an im-

portant consideration, they are only one of the considerations taken into account in making a designation decision under Section 3621(b).[8]

The circuits appear to agree that BOP has broad discretion to determine whether to allow a federal inmate to serve his federal time in state custody. See *Romandine*, 206 F.3d at 738-739 (agreeing with the Second and Third Circuits that that the Attorney General has discretion under Section 3621 effectively to run sentences concurrently by designating the state institution as the place for service of the federal sentence); see also *Abdul-Malik* v. *Hawk-Sawyer*, 403 F.3d 72, 75-76 (2d Cir. 2005); *Taylor* v. *Sawyer*, 284 F.3d 1143, 1147-1150 (9th Cir. 2002), cert. denied, 537 U.S. 1119 (2003); *Barden* v. *Keohane*, 921 F.2d 476, 483-484 (3d Cir. 1990).[9] Petitioner, in any event, does not challenge BOP's exercise of discretion; rather he seeks to challenge only action by the federal sentencing court. Because this case actually concerns BOP's refusal to allow petitioner credit for time in state custody for which he already received time under his state sentence, rather than any order by a district court made under Section

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[8] To the extent that language in the warden's earlier administrative decision (App., *infra*, 23a), or the government's briefs in the lower courts, suggests that the district court's indirect expression of its "wishes" was somehow a binding order on BOP, that was incorrect. The warden's decision, moreover, was not BOP's final word, and the Regional Director's decision did not rely on Section 3584. See App., *infra*, 26a-28a.

[9] Although the Second Circuit has suggested that *Romandine* disagreed on this score, see *Abdul-Malik*, 403 F.3d at 75-76, that cannot be squared with *Romandine*. See *Romandine*, 206 F.3d at 738-739 (noting that it agreed with the Second Circuit's "bottom line" that "[t]he Attorney General has discretion" to decide when to start the federal sentence by designating the place of service).

3584, the question raised by petitioner is not at issue here.

2. In any event, resolving whether district courts have the power to impose a sentence that is to run consecutively to an as-yet-unimposed state sentence is unnecessary because a district court's order that a defendant's sentence be served consecutively to future state sentences is not binding on state courts. This Court has long recognized that although federal and state courts "co-exist in the same space, *they are independent*, and have no common superior." *Ponzi* v. *Fessenden*, 258 U.S. 254, 261 (1922) (quoting *Covell* v. *Heyman*, 111 U.S. 176, 182 (1884)) (emphasis added). "[O]ur federal system is one of 'dual sovereignty,' and not one in which the Supremacy Clause controls sentencing." *Taylor* v. *Sawyer*, 284 F.3d at 1150 (quoting *Strand* v. *Schmittroth*, 251 F.2d 590, 605 (9th Cir.), cert. dismissed, 355 U.S. 886 (1957)). Each sovereign has "full power to set punishment for crimes against the * * * sovereign" unconstrained by the other sovereign. 284 F.3d at 1151. Consequently, "a determination as to concurrence of sentence made by one sovereign does not bind the other." *Jake* v. *Herschberger*, 173 F.3d 1059, 1065 (7th Cir. 1999). Thus, as a general matter, neither state courts nor state prison systems are bound by federal court orders concerning consecutive or concurrent sentencing. Cf. Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05*, at 3 (2003) ("Just as the federal government has no authority to prescribe when a state sentence will commence, the state has no authority to order commencement of a federal sentence."); cf. *United States* v. *Gonzalez*, 520 U.S. 1, 11 (1997) (in a case involving consecutive sentence under 18 U.S.C. 924(c)(1), which then

provided that no term of imprisonment imposed under it "shall * * * run concurrently with any other term of imprisonment," reserving the question "whether a later sentencing state court is bound to order its sentence to run consecutively to the [18 U.S.C.] § 924(c) term of imprisonment").

States may make their sentences concurrent to federal sentences if a defendant is in primary federal custody by designating the defendant's federal institution for service of the state sentence. If a defendant is in primary state custody, the state court can make the state sentence effectively concurrent to a subsequent federal sentence by deducting the length of the federal sentence from the time spent (or to be served) in the state system at sentencing, or by suspending a portion of the sentence. In addition, a defendant in state custody, a state court, or a state prison system can seek to have the Bureau of Prisons designate the state facility as the place for service of his federal sentence. See *Program Statement No. 5160.05*, *supra*, at 4-7.[10]

Petitioner disputes (Pet. 13-17) the effectiveness of such measures and argues that they require state courts to engage in unseemly maneuvers to effectuate their sentencing intentions, which is asserted to be an affront to "important sovereign interests of state crimi-

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[10] Here, petitioner claims (Pet. 15) that, because the federal sentence was silent on its effect on any future sentence, "the state court had no reason to believe that it was required to reduce its sentence * * * in order to ensure that its intent was effectuated." But BOP's Program Manual clearly states, with respect to subsequently-imposed state sentences, that "[i]f the federal sentence is silent * * * then the federal sentence shall not be placed into operation until the U.S. Marshals' Service or the Bureau of Prisons gains exclusive custody of the prisoner." BOP *Program Statement 5880.28*, at 1-32A.

nal justice systems." Pet. 13. But the interplay of state and federal sentencing intentions simply reflects the fact that each sovereign is entitled to decide whether its punishment should be cumulative of the other's. Here, the federal district court expressed its "wishes," through a letter from the Probation Office to BOP, that the federal sentence should be consecutive to petitioner's state sentence. BOP considered that intention in deciding that it was not "consistent with the goals of the criminal justice system," App., *infra*, 28a, to credit petitioner's sentence for his federal drug conviction with time he served on his state bail-jumping conviction. The federal government should not be required to surrender its independent judgment about the proper extent of a defendant's federal punishment, and reduce the length of federal imprisonment, in order to abide by the terms of the plea agreement that petitioner made with the State and that the state court accepted.

In sum, the disagreement over whether federal courts have the legal power to provide that a federal sentence shall run consecutively to a future state sentence does not have sufficient practical importance to warrant this Court's review. Even if it did, the Court should await a case where the issue is presented by the facts of the case, unlike this one where it is not.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*
ALICE S. FISHER
*Assistant Attorney General*
LOUIS M. FISCHER
*Attorney*

APRIL 2006

**APPENDIX A**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

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No. 4:04-CV-357-A

DOUGLAS EDWIN PIERCE, PETITIONER

*v.*

L. E. FLEMING, WARDEN

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DECLARATION OF JAMES E. HAZELTON

In accordance with the provisions of § 1746 of Title 28, United States Code, I, the undersigned, James E. Hazelton, do hereby make the following declaration, under penalty of perjury to the above-styled and numbered cause:

1. I am presently employed by the United States Government as the Inmate Systems Manager for the Federal Medical Center (FMC) located in Fort Worth, Texas. I have held this position since May 1998. The official duties and responsibilities of my current position include Official Custodian of Records for all inmates incarcerated at FMC Fort Worth. In this respect, I monitor inmates' files to ensure and verify that accurate sentence computations are performed. Pursuant to my official responsibilities, I have access to

records maintained in the ordinary course of business by the Federal Bureau of Prisons, including records reflecting an inmate's sentencing data.

2. Petitioner, Douglas Edwin Pierce, Register No. 03473-180, is a 34-year-old inmate currently serving a 78-month term of imprisonment with a five-year term of supervision for Conspiracy to Manufacture Methamphetamine in violation of 21 U.S.C. §§ 841 and 846. Petitioner was sentenced on January 3, 2002, in the United States District Court for the Western District of Texas. He is currently projected to satisfy this sentence on February 16, 2005, via Good Conduct Time Release. **See attached Exhibit "A" Sentry[1] Sentence Monitoring Computation Data.**

3. Petitioner was received at FMC Fort Worth on October 4, 2002, and remains here at present. In the petition, the petitioner seeks 652 days of federal custody credit. Petitioner was arrested on January 25, 2000, by the Hill County Sheriff's Department for Engaging in Organized Crime and Conspiracy to Manufacture Methamphetamine. He remained in jail until his release on bail on February 10, 2000. **See attached Exhibit "B" letters dated October 3, and October 7, 2002.** Petitioner was credited for 17 days of federal confinement for those days. On April 8, 2000, Petitioner was arrested for Bail Jumping and Failure to Appear by the Hill County, Texas law enforcement authorities. On January 17, 2001, the petitioner was transferred to the custody of the United States Marshals Service on the basis of a Writ of Habeas Corpus Ad Prosequendum for his federal court appearance. The petitioner was

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[1] Sentry is the Bureau of Prisons computerized inmate record-keeping system.

sentenced in the Western District of Texas on January 3, 2002, to 78 months incarceration for Conspiracy to Manufacture Methamphetamine. After sentencing, the petitioner was returned to the state and received a three-year sentence. On or about February 17, 2002, petitioner received a three-year sentence for his state offenses. The petitioner was paroled from his state sentence on June 28, 2002, to the U.S. Marshals Service for service of his sentence.

4. The petitioner states the state judge ordered his state sentence be run concurrent with his federal sentence. The U.S. Probation Office, Western District of Texas, was contacted to determine the Honorable Walter S. Smith's, Jr., U.S. District Judge, intention as far the operation of the petitioner's federal sentence relative to his state sentence. **See attached Exhibit "C"** correspondence dated May 29, 2003. In correspondence, dated June 20, 2003, U.S. Probation stated it was the court's intention the petitioner's federal sentence run consecutive to his state sentence. **See attached Exhibit "D"**

5. The petitioner states he should be awarded additional prior custody credits on his federal sentence from April 24, 2000 through January 2, 2003. 18 U.S.C. § 3585(b) and Bureau of Prisons Program Statement 5880.28, *Sentence Computation Manual CCCA* furthers defines prior custody as official detention that is a result of the instant federal offense or any other period of detentions that occur on or after the date of the federal offense and prior to commencement of the sentence and has not been credited to another sentence. Information was received from the Texas Department of Criminal Justice indicating the petitioner received credit on his state sentence from April 24, 2000, until

his parole on June 28, 2002. The arrest of the petitioner on April 8, 2000, was a not a result of the instant federal offense. However, credit was awarded from April 8, 2000, to April 23, 2000, (16 days of federal custody credit) on the petitioner's federal sentence in accordance with 18 U.S.C. § 3585(b) and Bureau of Prisons Program Statement 5880.28, *Sentence Computation Manual CCCA*. Petitioner received 33 days of prior custody credit.

6. As custodian of inmate records at FMC Fort Worth, I certify that the report titled Sentence Monitoring Computation Data attached here to as Exhibit C is a true and correct copy of that report for the petitioner. I also certify that his release date calculated as February 16, 2008, is correct and computed in accordance with Bureau of Prisons Program Statement 5880.28 and Title 18 U.S.C. § 3568.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of June 2004.

/s/ JAMES E. HAZELTON
JAMES E. HAZELTON
Inmate Systems Manager
Federal Medical Center
3150 Horton Road
Fort Worth, Texas 76119-5996

**EXHIBIT A**

FTWSV 540*23 * SENTENCE MONITORING * 06-21-2004
PAGE 001 * COMPUTATION DATA * 13:13:18
AS OF 06-21-2004

REGNO..: 03473-180 NAME: PIERCE, DOUGLAS EDWIN

FBI NO .....: 348023NB1 DATE OF BIRTH: 08-03-1969
ARS1 .....: FTW/A-DES
UNIT .....: SAN QUARTERS ...: S04-081L
DETAINERS ....: NO NOTIFICATION: YES

PRE-RELEASE PREPARATION DATE: 08-16-2007

THE FOLLOWING SENTENCE DATA IS FOR THE INMATE'S CURRENT COMMITMENT.
THE INMATE IS PROJECTED FOR RELEASE: 02-16-2008 VIA GCT REL

-------CURRENT JUDGMENT/WARRANT NO: 010 -------

COURT OF JURISDICTION .....: TEXAS, WESTERN DISTRICT
DOCKET NUMBER .....: W-01-CR-006(01)
JUDGE .....: SMITH
DATE SENTENCED/PROBATION IMPOSED : .....: 01-03-2002
DATE COMMITTED .....: 10-04-2002
HOW COMMITTED...: US DISTRICT COURT COMMITMENT
PROBATION IMPOSED .....: NO

| | FELONY ASSESS | MISDMNR ASSESS | FINES | COSTS |
|---|---|---|---|---|
| NON-COMMITTED.: | $100.00 | $00.00 | $2,000.00 | $00.00 |

RESTITUTION . . : PROPERTY: NO SERVICES: NO
AMOUNT: $00.00

----------CURRENT OBLIGATION NO: 010----------
OFFENSE CODE . . . . : 391

OFF/CHG: 21:846,841 CONSPIRACY TO MANUFACTURE METHAMPHETAMINE - CT S1

SENTENCE PROCEDURE . . . . . : 3559 PLRA SENTENCE
SENTENCE IMPOSED/TIME TO SERVE. : 78 MONTHS
TERM OF SUPERVISION . . . . . : 5 YEARS
CLASS OF OFFENSE . . . . . : CLASS B FELONY
DATE OF OFFENSE . . . . . : 01-31-2000

FTWSV 540*23 SENTENCE MONITORING * * 06-21-2004
PAGE 002 COMPUTATION DATA * 13:13:18
AS OF 06-21-2004

REGNO..: 03473-180 NAME: PIERCE, DOUGLAS EDWIN

----------CURRENT COMPUTATION NO: 010----------

COMPUTATION 010 WAS LAST UPDATED ON 11-26-2002
AT FTW AUTOMATICALLY

THE FOLLOWING JUDGMENTS, WARRANTS AND OBLIGATIONS
ARE INCLUDED IN CURRENT COMPUTATION 010: 010 010

DATE COMPUTATION BEGAN.....: 06-28-2002
TOTAL TERM IN EFFECT.....: 78 MONTHS
TOTAL TERM IN EFFECT CONVERTED....: 6 YEARS 6 MONTHS
EARLIEST DATE OF OFFENSE.....: 01-31-2000

| JAIL CREDIT.....: | FROM DATE | THRU DATE |
|---|---|---|
| | 01-25-2000 | 02-10-2000 |
| | 04-08-2000 | 04-23-2000 |

| | |
|---|---|
| TOTAL PRIOR CREDIT TIME.....: | 33 |
| TOTAL INOPERATIVE TIME.....: | 0 |
| TOTAL GCT EARNED AND PROJECTED....: | 282 |
| TOTAL GCT EARNED.....: | 81 |
| STATUTORY RELEASE DATE PROJECTED: | 02-16-2008 |
| SIX MONTH / 10% DATE.....: | N/A |
| EXPIRATION FULL TERM DATE.....: | 11-24-2008 |
| PROJECTED SATISFACTION DATE.....: | 02-16-2008 |
| PROJECTED SATISFACTION METHOD....: | GCT REL |

REMARKS . . . . . .: AWARDED JAIL CREDIT WAS NOT APPLIED TO STATE SENTENCE. INMATE WAS RELEASED BY PAROLE, 06-28-2002 TO US MARSHALS TO BEGIN HIS FEDERAL SENTENCE.

G0002 MORE PAGES TO FOLLOW . . . . . .

FTWSV 540*23 * SENTENCE MONITORING * 06-21-2004
PAGE 003 OF 003 * COMPUTATION DATA * 13:13:18
AS OF 06-21-2004

REGNO..: 03473-180 NAME: PIERCE, DOUGLAS EDWIN

-------- ----------CURRENT NOTIFIES: ----------

| | |
|---|---|
| NOTIFY.....: | 001 |
| DATE RECEIVED.....: | 09-30-2002 |
| AUTHORITY..... : | TEXAS DEPARTMENT OF CRIMINAL JUSTICE |
| ADDRESS.....: | 8610 SHOAL CREEK BLVD<br>AUSTIN, TX 78711 |
| PHONE NUMBER.....: | (512) 406-5356 |
| REMARKS.....: | SUPERVISION ONLY UNTIL 04-24-2003 (TDCJ# 01084005) |

G0000 TRANSACTION SUCCESSFULLY COMPLETED

**EXHIBIT B**

U.S. Department of Justice
Federal Bureau of Prisons
Federal Medical Center

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3150 Horton Road
Fort Worth , Texas 76119

October 03, 2002

Hill County Sheriff's Department
Attn: Jail Records/ Booking
218 N. Waco
Hillsboro, Texas 76645

**URGENT-PLEASE RESPONSE**

RE: Inmate: PIERCE, DOUGLAS E.
Register Number: 03473-180
Case Number: 31,612
DOB: 08-03-1969 W/M
FBI#348023NBI
SSN: [redacted]

Charge: Engaging in Organized Crime – Conspiracy to manufacture methamphetamine

To Whom It May Concern:

The above-named individual is currently incarcerated at the Federal Medical Center, Fort Worth, Texas. In light of recent court decisions, the Attorney General is required to credit time spent in non-federal custody as jail time towards federal sentences in certain situations. In order to make an accurate determination on whether the above mentioned

inmate would be entitled to credit on his federal sentence for time spent in your custody, the following information is requested.

Dates of arrest/custody: Since January 2000 and/or after
(Beginning & Ending) If possible, please answer request and send a booking sheet also.

Length of time in your custody/date of release: See Attached Letter

Name of agency for which inmate was detained Hill County

Charge(s) Engaging in Organized Crime

Were date(s) credited to your sentence or given time served: No

(How much time credited)____

Was bail set?_____ If yes, date of release?_____

Type of Rel._____

Disposition of your charge: Filed Federally

(What is the status)

Date Federal detainer was filed:_____

Thank you for your assistant in this matter. If additional information is needed, please contact the Records Office at (817) 413-3054 (direct line) or 534-8400, ext. 3054. Please fax your response to (817) 413-3327.

Sincerely,

/s/ ALICE F. ROSS, LIE
for James E. Hazelton
Inmate Systems Manager

Verifying Official's Signature/Date
/s/ KATINA M. CASTRO
KATINA M. CASTRO

# HILL COUNTY SHERIFF'S OFFICE

Brent Button, Sheriff

P.O. Box 283 Hillsboro, Texas 76645

October 7, 2002
Federal Medical Center
3150 Horton Road
Ft. Worth, Texas 76119

Attn: Alice F. Ross
Legal Instruments Examiner

Re: Inmate: Pierce, Douglas E.
Register # 03473-180

Dates in Custody Hill County Jail:

| | | |
|---|---|---|
| 01-25-00 – 02-10-00 | 17 Days | |
| 04-08-00 – 01-17-01 | 285 Days | |
| 02-13-02 – 02-27-02 | 26 Days | On 02-13-02 Pierce was brought back to Hill County from Federal to take care of Bail Jumping and Failure to Appear charge was released to TDCJ on 02-27-02. |
| Total Days: | 328 Days | |

Pierce is not wanted by this agency.

Sincerely,

/s/ KATINA M. CASTRO
KATINA M. CASTRO
Warrants Division

---

Communications (254) 582-5313
Criminal Investigation Division
(254) 582-2153

Jail (254) 582-3878

Fax (254) 582-3848

**EXHIBIT C**

U.S. Department of Justice
Federal Bureau of Prisons
*Federal Medical Center*

---

3150 Horton Road
Fort Worth, Texas 76119

May 29, 2003

Melissa Suniga
Senior U.S. Probation Officer
Western District of Texas
Waco, Texas

RE: PIERCE, Douglas Edwin
Reg. No. 03473-180
Case Number: W-01-CR-006(0l(

Dear Ms Suniga:

Mr. Pierce, Douglas is currently serving a 78-month term of imprisonment in the Federal Medical Center, at Fort Worth, TX. He has requested a nunc pro tunc designation which would allow his federal sentence to be served concurrently with his state sentence.

Mr. Pierce was originally arrested by State of Texas law enforcement officials. Mr. Pierce was sentenced to a 3-year term in the Texas Department of Criminal Justice. He was produced in the Western District of Texas on the basis of a Writ of Habeas Corpus Ad

Prosequendum. On January 3, 2002, Mr. Pierce was sentenced in federal court to 78- months imprisonment for Conspiracy to Manufacture Methamphetamine. The Court did not specify whether the federal sentence should be served concurrently or consecutively with his state sentence. After sentencing, Mr. Pierce was returned to state custody. On June 28, 2002, Mr. Pierce was paroled from the State of Texas and his federal sentence commenced.

In accordance with the Bureau of Prisons Program Statement 5160.03, Designation of State Institution for Service of Federal Sentence, and Title 18 U.S.C. 3584, "if multiple terms of imprisonment are imposed at different times (emphasis added) without the judge specifying whether they are to run concurrently or consecutively, they will run consecutively unless the statute specifies otherwise."

**SENSITIVE - LIMITED OFFICIAL USE**

In addition, any decision concerning concurrent or consecutive service of a federal sentence with a state sentence is not dependent on the order of which sentence is imposed first. Since the federal judgment and commitment order is silent and state authorities had primary jurisdiction over Mr. Pierce, the federal sentence will be served consecutive to the state sentence.

The federal sentencing judge may order the federal sentence to run consecutive to a state sentence to be imposed. The Bureau of Prisons interprets Title 18 U.S.C. 3584 to also permit the federal judge to order concurrent service with a state sentence. To allow the federal sentence to commence, the Bureau of Prisons designates the state correctional institution for service of the federal sentence. This designation is made effec-

tive nunc pro tunc to the date of federal sentencing. This decision is not dependent upon whether a state sentence has been imposed or will be imposed in the future.

Currently, Mr. Pierce's federal sentence has been computed to commence on June 28, 2002, the date he was released from the State of Texas. However, Mr. Pierce has requested a nunc pro tunc designation to commence his federal sentence on January 3, 2002, the date of federal sentencing.

As a result of the decision in Barden v. Keohane, 921 F.2d 476 (3rd Cir. 1990), the Bureau of Prisons considers an inmate's request for presentence credit toward a federal sentence, for time spent in service of a state sentence, as a request for a nunc pro tunc designation. The Court in Barden held that the Bureau must consider an inmate's request for concurrent service of the state and federal sentences.

Pursuant to our program statement, a designation for concurrent service of sentence should be made only when it is consistent with the intent of the sentencing federal court, or with the goals of the criminal justice system. Therefore, our office is seeking your assistance in bringing this matter before the Court. If the Court wishes for Mr. Pierce's federal sentence to commence on January 3, 2002, we ask that you please forward a letter or amended order to our office.

We have enclosed Mr. Pierce's Judgment and Commitment Order for your information. If you have any questions or concerns, please do not hesitate to contact James E. Hazelton, Inmate Systems Manager, at (817) 413-3051.

Your assistance in this matter is appreciated.

Sincerely,

/s/ JAMES E. HAZELTON
JAMES E. HAZELTON
Inmate Systems Manager

**EXHIBIT D**

# UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS
PROBATION OFFICE

[SEAL OMITTED]

June 20, 2003

WACO

James E. Hazelton
Inmate Systems Manager
Federal Medical Center
3150 Horton Road
Ft. Worth, Texas 76119

RE: PIERCE, Douglas Edwin
Dkt. #W-01-CR-006(01)
Reg. #03473-180
Concurrent/Consecutive Sentencing

Dear Mr. Hazelton:

The Court reviewed the request to have the above-named inmate's sentence amended to run concurrently with his State sentence.

After careful consideration by the Court, the request for concurrent sentencing was denied. The Court wishes this inmate's sentence to run consecutive to his State sentence.

Sincerely,

/s/ MELISSA SUNIGA
MELISSA SUNIGA
Senior U.S. Probation Officer

ZMS/dt

cc: Douglas Edwin Pierce
Register #03473-180
Federal Medical Center
P.O. Box 15330
Ft. Worth, Texas 76119

cc: Joe Sanchez, ADCUSPO, Austin, TX

## APPENDIX B

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

REQUEST FOR
ADMINISTRATIVE REMEDY

*Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.*

From: Douglas Edwin Pierce 03473-180 San Antonio FMC-Ft. Worth
LAST NAME, FIRST, MIDDLE INITIAL REG NO UNIT INSTITUTION

**Part A - INMATE REQUEST**

Pursuant to my initial computation data time sheet I was credited 652 days towrds [*sic*] my current sentence for my state sentence because the state Judgment and Committment [*sic*] Order specified my state sentence was to run concurrently to my Federal sentence. Subsequently on 6-11-03 the records department, without explanation, removed and denied the 652 days credit thus deeming my new projected release date as being that of 2-16- 2008 as opposed to 11-18-2005 as stated in the initial computation sheet. I am requesting that I be re-granted the 652 days against my sentence.

*8-11-03* /s/ DOUGLAS E. PIERCE
DATE SIGNATURE OF REQUESTER

**Part B - RESPONSE**

[Revd: 8/13/03]

*8-25-03* /s/ L. E. FLEMING
DATE WARDEN OF REGIONAL DIRECTOR

*If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.*

FIRST COPY: WARDEN'S ADMINISTRATIVE REMEDY FILE

CASE NUMBER: *307637-F1*

---

CASE NUMBER: *307637-F1*

**Part C - RECEIPT**

Return to: _____ _____ ____ _____

LAST NAME, FIRST, MIDDLE INITIAL — REG. NO — UNIT — INSTITUTION

SUBJECT _____

*8/13/03* _____

DATE — RECIPIENT'S SIGNATURE (STAFF MEMBER)

PIERCE, Douglas REG. NO.: 03473-180

FILED: 08-13-2003

REMEDY NO. 307637-F1 PART B - RESPONSE

This is in response to your Request for Administrative Remedy, dated August 11, 2003, wherein you request your federal sentence to run concurrent with your state sentence and to be granted 652 days for service of a state sentence as ordered by the state Judgment and Commitment Order.

An investigation was conducted and found on May 29, 2003, the U.S. District Court for the Western District of Texas, was contacted to determine if the Court had any objections to your federal sentence running concurrent with your state sentence. This inquiry was based on your state sentence being ordered to run concurrent with your federal sentence and your request to Inmate Systems Management staff. On June 22, 2003, a letter was received from the U.S. District Court for the Western District of Texas stating it was the Court's wish for your federal sentence to run consecutive to your state sentence. Based on the Court's wishes, your sentence was computed to show a start date of June 28, 2002, when you were released from state custody. You cannot receive credit from April 24, 2000, to January 2, 2003, as the state awarded this credit to your state sentence. As outlined in Program Statement 5880.28, Sentence Computation Manual (CCCA of 1984), Title 18 U.S.C. 3585(b) is the statute authorizing the award of presentence credit. This statute authorizes credit for time spent in official detention prior to the imposition of

a sentence that has not been credited against another sentence. To award credit that was applied to your state sentence would be contrary to the intent of this statute. You cannot obtain relief under Willis v. U.S., 449 F2d 923(CA 5, 1971) because your federal sentence was specifically ordered to be consecutive to your state sentence.

Based on the above information, your request is denied.

If you are not satisfied with this decision, you may appeal to the Regional Director at Bureau of Prisons, South Central Region, 4211 Cedar Springs Road, Suite 300, Dallas, Texas 75219, via a BP-230(13). Your appeal must be received in the South Central Regional Office within 20 days of the date of this response.

/s/ L. E. FLEMING — *8-25-03*

L. E. FLEMING, Warden — Date

**APPENDIX C**

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

REGIONAL ADMINISTRATION
REMEDY APPEAL

*Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-DIR-9 including any attachments must be submitted with this appeal.*

From: Pierce Douglas E. 03473-180 SAN FMC-Ft. Worth
LAST NAME, FIRST, MIDDLE INITIAL REG NO UNIT INSTITUTION

**Part A - REASON FOR APPEAL** *Pursuant to my initial computation data time sheet I was credit 652 days towrds [sic] my current sentence for my state sentence because the state Judgement and Committment [sic] order specified my state sentence was to run concurrently to my Federal sentence. Subsequently on 6-11-03 the records department, without explanation, received and denied the 652 days credit thus deeming my new projected release date as being that of 2-16-2008 as opposed to 11-18-2005 as stated in the initial. I am requesting that I be re-granted the 652 days against my sentence.*

7-13-03 /s/ DOUGLAS E. PIERCE
DATE SIGNATURE OF REQUESTOR

**Part B - RESPONSE**

[Seal Omitted]

DATE REGIONAL DIRECTOR

**If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.**

THIRD COPY WARDEN'S ADMINISTRATIVE REMEDY FILE

CASE NUMBER: *307637-R1*

---

**Part C – RECEIPT**

CASE NUMBER _____

Return to: _____ _____ ____ _____

LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

SUBJECT _____

_____ _____

DATE — RECIPIENT'S SIGNATURE (STAFF MEMBER)

PIERCE, Douglas Edwin REG. NO. 03473-130

RECEIPTED: 09-18-03

CASE NO. 307637-R1 PART B - RESPONSE

You are appealing the Warden's response to your complaint regarding your sentence computation. You are requesting 652 days of credit be applied to your federal sentence.

Investigation reveals you were arrested by state law enforcement officials on April 8, 2000, for Bail Jumping and Failure to Appear. On January 17, 2001, you were transferred to the custody of the U.S. Marshals Service on the basis of a Writ of Habeas Corpus Ad Prosequendum for your federal court appearance. You were sentenced in the Western District of Texas to 78 months imprisonment for Conspiracy to Manufacture Methamphetamine. After sentencing, you were returned to the state and received a three-year sentence for the state charges. You paroled from your state sentence on June 28, 2002, to the U.S. Marshals Service for service of your federal sentence.

You were designated to the Fort Worth Federal Medical Center for service of your sentence. As a result of the language on your state judgment reflecting the sentence should be served concurrently with your federal sentence, institution staff contacted the U.S. Probation Officer. The Probation Officer contacted the sentencing judge regarding the issue of concurrent service of your state and federal sentences. Staff were informed the court intended for your federal sentence to be served consecutively to your state sentence.

Program Statement 5880.28, *Sentence Computation Manual (CCCA of 1984)*, states time spent under a writ of habeas corpus from non-federal custody will not, in itself, be considered for the purpose of custody credit. The primary reason for custody is not the federal charge. It is considered the federal court "borrows" an individual under the provisions of the writ for the purpose of the court appearance. Contact with the Texas Department of Criminal Justice has confirmed you received credit on your state sentence from April 24, 2000, until you were paroled on June 28, 2002.

As outlined in Program Statement 5880.28, *Sentence Computation Manual* (CCCA of 1984), Title 18 U.S.C. 3585(b) is the statute authorizing the award of presentence credit. This statute authorizes credit for time spent in official detention prior to the imposition of a sentence that has not been credited against another sentence. To award credit that was applied to your state sentence would be contrary to the intent of this statute.

You indicate the state judge ordered your state sentence to run concurrently with your federal sentence. However, your federal sentence was not operative when you were sentenced in state court. In addition, an order by the state judge is not binding upon the Bureau of Prisons. The state judge has no statutory authority to commence the federal sentence.

As a result of the decision in Barden v. Keohane, 921 F.2d 476 (3rd Cir. 1990), the Bureau of Prisons considers an inmate's request for presentence credit toward a federal sentence, for time spent in service of a state sentence, as a request for a *nunc pro tunc* designation. The Court in Barden held that the Bureau must consider an inmate's request for concurrent

service of the state and federal sentences. However, in accordance with our policy, a designation for concurrent service of sentence, is made only when it is consistent with the intent of the sentencing federal court, or with the goals of the criminal justice system.

When reviewing cases for possible concurrent designation to a state facility, we consider the available information, consistent with Title 18 U.S.C. § 3621, Imprisonment of a Convicted Person. We are also provided guidance in Program Statement 5160.05, *Designation of State Institution for Service of Federal Sentence*. In your specific case, we find commencement of your federal sentence by way of a concurrent designation is not consistent with the goals of the criminal justice system.

You have received all applicable credit, and your sentence computation is correct. Therefore, your appeal is denied.

In the event you are dissatisfied with this response, you may appeal to the Bureau of Prisons, Administrative Remedy Section, 320 First Street, NW, Washington, D.C. 20534. Your appeal must be received in that office within 30 days from the date of this response.

*11-14-03*
Date

[SIGNATURE ILLEGIBLE]
*for* Ronald G. Thompson
Regional Director

(2)

No. 05-826

FILED
APR 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

Douglas Edwin Pierce,

*Petitioner*,

v.

Cole Jeter, Warden, Federal Medical Center Fort Worth.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

## REPLY BRIEF FOR THE PETITIONER

Pamela S. Karlan
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
Amy Howe
Kevin K. Russell
(Counsel of Record)
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

April 18, 2006

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## REPLY BRIEF FOR THE PETITIONER

The Solicitor General acknowledges that the court of appeals' holding, adopted at the government's urging, is consistent with the law in three other circuits but in conflict with the precedent of three others. BIO 9-10. The government does not argue that this division will repair itself without this Court's intervention. To the contrary, the division has persisted for more than fifteen years, is widely acknowledged among the courts of appeals, and has widened rather than narrowed over time. Pet. 9-11. Nor does the government dispute that the question presented is recurring[1] or that it predictably results in disparate sentences among similarly situated defendants depending on the circuit in which they are sentenced or incarcerated. In short, the government does not and cannot contest that the issue raised in this case meets all of the criteria for review by this Court.

Instead, the principal basis of the government's opposition to certiorari is its assertion that the question presented does not in fact arise in this case. That assertion rests on a dramatic repudiation of the central representations the government made to the lower courts in order to win this case below. Before the district court and the court of appeals, the government defended against petitioner's claims on the ground that the federal district court had the power to order petitioner's sentence served consecutively to any future state sentence, and had exercised that power in this case. Having prevailed on that theory below, the government now abandons it this Court, asserting that the district court did not in fact validly order consecutive sentences. Instead, the government now argues, petitioner's consecutive sentences

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[1] Indeed, the question presented has arisen in other cases even in the short time since the petition in this case was filed. See *Aguilar* v. *Peterson*, No. 04-6376, 2006 U.S. App. LEXIS 5471, at *3 n.3 (CA10 Mar. 2, 2006); *Binford* v. *United States*, 436 F.3d 1252, 1254 (CA10 2006).

are solely the result of a decision by the federal Bureau of Prisons (BOP). Certiorari therefore should be denied, the government asserts, because petitioner "does not challenge BOP's exercise of discretion; rather he seeks to challenge only action by the federal sentencing court." BIO 12.

The government's position is as remarkable as it is meritless, for the Fifth Circuit decided the question presented precisely because the government defended against petitioner's claims throughout this litigation in the lower courts on the ground that the district court *did* order a consecutive sentence and that its sentencing determination was binding. By failing to challenge the predicate for the court of appeals' legal decision – and, indeed, affirmatively advancing it – the government has waived any objection to the Fifth Circuit's conclusion that the district court validly ordered consecutive sentences in this case.

In any event, the government itself argues that it ultimately makes no difference whether the district court's order was valid or not. Instead, the Solicitor General argues that it is up to the executive branch, not the judiciary, to decide whether two sentences rendered at different times shall be served concurrently or consecutively. BIO 10-12. The question of who has the authority to make that decision – the first court, the second, or the BOP – lies at the heart of the circuit split. Given that neither the government nor petitioner now argues that the decision belongs to the first sentencing court, the government's eleventh hour challenge to the validity of the district court's sentencing order, even if permitted, poses no obstacle resolving the circuit conflict in this case.

The need for that resolution is aptly demonstrated here. The Solicitor General acknowledges that his current view of the statute conflicts with the position taken by the lawyers for BOP in the lower courts. BIO 12 n.8. He also admits that the BOP itself applied conflicting interpretations at different stages of the administrative process. *Ibid.* That the federal

government itself is so profoundly confused about the proper interpretation of this important sentencing statute, and that the question has yielded a sustained three-way conflict among seven federal courts of appeals, demonstrates the compelling need for intervention by this Court. Certiorari should be granted.

1. The government's assertion that "the question presented by the petition * * * is * * * not presented by the facts of this case," BIO 10, is premised on its untimely assertion that the "facts of this case" are not what the government represented them to be before the courts below.

a. In the lower courts, the government argued that petitioner was not entitled to credit for time served under his state sentence because "the federal sentencing court specifically stated its intention that the federal sentence run consecutively to the state sentence" and because "clear Fifth Circuit precedent supports the federal sentencing court's authority to have its sentence run consecutive to the yet to be imposed state sentence." U.S. C.A. Br. 13.[2] The court of appeals accepted both the government's factual representations and its legal argument. The Fifth Circuit thus held that the "sentencing court had the discretion to order that the federal term of imprisonment run either consecutively to

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[2] In the district court, the government likewise argued that "*the district court* clearly had discretion to order Pierce's federal sentence to run consecutively to his impending state sentence." Respondent's Motion to Dismiss with Memorandum Brief 4 (emphasis added). See also Respondent's Response to Petitioner's Traverse 2 ("Pierce has failed to state a claim for relief with respect to the claim raised in his Petition for Writ of Habeas Corpus, as *the federal sentencing court* specifically stated its intention that the federal sentence run consecutively to the state sentence, see Ex. D, p. 012 to Motion for Summary Judgment, and clear Fifth Circuit precedent supports *the federal sentencing court's authority* to have its sentence run consecutive to the yet imposed [sic] state sentence.") (emphasis added).

or concurrently with an anticipated, but not yet imposed state sentence." Pet. App. 2a. And it further found that "respondent submitted unrefuted evidence with its summary judgment motion that indicated that the federal sentencing court intended for the sentence to run consecutively to his state sentence." *Id.* 2a-3a. This was the sole ground upon which petitioner's claim for a concurrent sentence was resolved. *Id.* 3a.[3]

The Solicitor General now attempts to refute the predicate for the government's case below in order to avoid this Court's review of the legal question decided by the Fifth Circuit at the government's urging. In particular, the Solicitor General now asserts that, despite the government's representations to the contrary, the district court did not, in fact, validly order consecutive sentences because it did not express that intent in the original judgment and commitment order. BIO 10. Thus, he concludes, "the question raised by

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[3] The brief in opposition could be read to suggest that the Fifth Circuit also relied on 18 U.S.C. 3585 to deny petitioner's right to a concurrent sentence. See BIO 11. That would be incorrect. Petitioner made a separate claim to be entitled under Section 3585(b) to credit for the time served in a federal facility under a writ of *habeas corpus ad prosequendum* while awaiting his federal trial. See Pet. C.A. Br. 15-16. The court of appeals addressed that distinct claim after having rejected his asserted right to a concurrent sentence: "Finally, because the record indicates that the time that Pierce spent in federal custody pursuant to a writ of habeas corpus ad prosequendum was credited against his state sentence, the BOP correctly applied 18 U.S.C. 3585(b)(2) when it did not include *this time* as a credit toward Pierce's federal sentence." Pet. App. 3a (emphasis added). Thus, the court of appeals held that petitioner received all the credit to which he was entitled under Section 3583(b) so long as the state had counted the time in federal custody on the *prosequendum* writ against his state sentence. Petitioner does not seek review of that determination in this Court. Rather, petitioner maintains that his state and federal sentences were concurrent by operation of Section 3584(a).

petitioner is not at issue here" because petitioner "does not challenge BOP's exercise of discretion" but rather "seeks to challenge only action by the federal sentencing court." BIO 12-13. It should come as no surprise that the government's attempt to preserve the judgment below by asserting that it misled the lower courts does not withstand scrutiny.

The Solicitor General cites no on-point authority for the proposition that Section 3584 requires a court to express its concurrent/consecutive decision at the time of sentencing, see BIO 11, and no such requirement appears on the face of the provision. But the merits of that proposition are beside the point, for the government's second thoughts come far too late in the day. The court of appeals decided the case on the assumption, necessarily shared by the government, that the district court had ordered consecutive sentences *nunc pro tunc*. This Court can easily do the same, deeming the validity of the district court's order established by the government's reliance upon the order and failure to raise its current objection below.

Indeed, this Court routinely decides cases on the assumption that the court of appeals correctly resolved the predicate factual and legal questions giving rise to the question presented.[4] This practice is particularly appropriate

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[4] See, *e.g.*, *United States* v. *Georgia*, 126 S. Ct. 877, 880 (2006) (deciding Eleventh Amendment question based on the assumption that the court of appeals was correct that the plaintiff alleged actual violations of the Eighth Amendment); *Ferguson* v. *City of Charleston*, 532 U.S. 67, 76 (2001) (deciding whether state hospital's drug testing of maternity patients was an unreasonable search under the Fourth Amendment on the assumption that the court of appeals was correct that the searches were suspicionless and without valid consent); *Lilly* v. *Virginia*, 527 U.S. 116, 124 n.1 (1999) (assuming, despite defendant's suggestion otherwise, that witness was unavailable, for purposes of deciding Confrontation Clause question); *Salinas* v. *United States*, 522 U.S. 52, 55 (1997) (noting Court granted certiorari to resolve interpretation of federal

when that predicate not only went unchallenged below, but was in fact embraced by the party who now seeks to reverse its position to the prejudice of the opposing party. See, *e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 277-79 (1977) (assuming that school board was subject to suit under 42 U.S.C. 1983, and proceeding to reach the merits, where defendant failed to raise challenge to statute's applicability in the lower courts); *Lachance* v. *Erickson*, 522 U.S. 262, 266 (1998) (deciding due process question on the assumption that government employee had protected property interest in employment, given the court of appeals' statement that the point was undisputed below).

b. In any event, the timing of the district court's order is ultimately immaterial under both petitioner's and the government's view of the law. The essence of the disagreement between the parties and among the circuits is over the authority of the second sentencing court (here, the state court) to order concurrent sentences.[5] In petitioner's view, Section 3584(a) gives to the second sentencing court alone the power to determine whether the two sentences shall be consecutive or concurrent. As the Ninth Circuit observed in *United States* v. *Clayton*, 927 F.2d 491, 492 (1991), the

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bribery statute, but denied certiorari on question whether statutory predicates were met).

[5] It is true that the question presented as phrased by petitioner speaks in terms of the power of the *first* sentencing court, but petitioner can hardly be blamed for framing the question in the terms used by the court of appeals at the urging of the government. Both the petition itself and the court of appeals' decision make clear that the legal question presented by the case turns on the legal consequences of an order for concurrent sentences by the second sentencing court. Were the wording of the question presented a genuine obstacle to certiorari, this Court could simply rephrase the question in light of the government's new position, see *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992), or adopt the government's alternative phrasing. See BIO i.

under Section 3584(a), "Congress contemplated only that federal sentencing be consecutive to state convictions for which the defendant was already sentenced." Properly construed, the statute protects a subsequent state court's right to "fulfill[] its own interests by running the state sentence concurrently with the federal term." *Id.* at 493. In light of this purpose, Section 3584(a) requires the BOP to respect a state court's designation of its sentence as concurrent with an already-imposed federal sentence. See Pet. 23-26. Under this interpretation, it makes no difference whether the first sentencing court expressed its intent that the sentences should be consecutive.

The government likewise has argued in both this Court and the Fifth Circuit that the validity of the district court's order is immaterial. In the court of appeals, the government argued that even if the district court had not ordered consecutive sentences, but remained silent on the question, the last sentence of Section 3584(a)[6] would nonetheless "dictate[] that they be served consecutively absent language in the sentencing decision to the contrary." U.S. C.A. Br. 12. This interpretation of the last sentence of Section 3584(a) has been adopted by the Tenth Circuit, see *United States* v. *Williams*, 46 F.3d 57, 58-59 (CA10), cert. denied, 516 U.S. 826 (1995), but has been rejected by the Second, Sixth, and

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[6] That sentence provides: "Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." As noted above, some courts have misinterpreted this sentence to provide that if the first sentencing court is silent, any subsequent sentence rendered by another court must run consecutive to the first, regardless of the intention of the second sentencing court. As explained in the petition, Pet. 23, this interpretation is wrong. Sensibly read in context, the sentence permits the second sentencing court, not the first, to order concurrent sentences and provides that if the second sentencing court remains silent, the sentences run consecutive to one another.

Seventh Circuits, see *Romandine* v. *United States*, 206 F.3d 731, 737-38 (CA7 2000); *United States* v. *Quintero*, 157 F.3d 1038, 1040 (CA6 1998); *McCarthy* v. *Doe*, 146 F.3d 118, 121-22 (CA2 1998).

In this Court, the government advances yet a different argument, but the district court's sentencing order is nonetheless still immaterial even under this new view. The Solicitor General now argues that both Section 3584(a) and any order of the sentencing court are entirely irrelevant because "BOP, not the federal sentencing court, has the authority to determine how much credit a defendant should receive for time spent in official detention before the commencement of his federal sentence." BIO 10-11 (citing 18 U.S.C. 3585, 3621). The Seventh Circuit's decision in *Romandine* v. *United States*, 206 F.3d 731 (2000), appears to support that view. In *Romandine*, the court concluded that the first sentencing court lacks any authority to decide whether its sentence shall be consecutive to a later sentence because that decision is left to the executive branch. *Id.* at 737-38. Under this interpretation, the government argues, the district court had no authority to order consecutive sentences (or, for that matter, concurrent sentences); any order it might have issued (timely or not) would simply be an "important consideration" in the exercise of the BOP's discretion. BIO 11-12.

Thus, whether this Court takes the case as argued by the government below or as the Solicitor General recharacterizes it now, the facts present this Court with an appropriate vehicle for resolving the recurring conflict and confusion over the proper construction of Section 3584(a).

In any case, any lingering concern over the effects of the district court's sentencing order in this case could be alleviated by granting certiorari in both this case and in *Cox* v. *United States*, No. 05-454, in which there is no question of the validity of the district court's order requiring consecutive sentences. See *Cox* BIO 4.

2. The government's only other objection to certiorari is its continuing insistence that even if BOP and four circuits are persistently misapplying Section 3584(a) to unlawfully extend the imprisonment of federal inmates, the issue "does not have sufficient practical importance to warrant this Court's review." BIO 15. This assertion is also wrong.

The Solicitor General cannot seriously contest that the lawfulness of the government's continued confinement of its citizens is a matter of paramount practical importance, as is the consistent and faithful application of the laws Congress has enacted to regulate and confine the Executive's exercise of its power to deprive individuals of their liberty. Moreover, the proper interpretation of Section 3584(a) is a matter of the utmost importance in accommodating the inherent tensions that arise under our system of dual sovereignty, affecting the delicate balance between the powers of the federal government and the effective operation of the most basic functions of the states. As set forth in the petition, the government's interpretation of Section 3584(a) permits an invasion of state prerogatives, substantially interfering with the ability of state prosecutors to reach plea bargains in the State's interest, as well impeding state courts' efforts to issue fair sentences with confidence that the defendant will, in fact, serve the time anticipated by the sentencing court. Pet. 13-14.

The government does not dispute that absent intervention by this Court, Section 3584(a) will continue to be misapplied in numerous cases, leading to substantially disparate periods of confinement for individuals with indistinguishable sentences. Instead, the Solicitor General asserts that this invasion of state prerogatives and the resulting sentencing inequities are unimportant because they are theoretically avoidable by state courts intent on defying a federal court's interpretation of Section 3584(a). See BIO 13-14. Petitioner has already explained in detail that the manipulations advocated by the Solicitor General may not be possible in